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Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,
Petitioner,

v.

FRANCISCO J. ESPINOSA,
Respondent.

On Petition For Writ Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL COUNCIL OF HIGHER EDUCATION LOAN PROGRAMS, INC. *ET AL.* IN SUPPORT OF PETITIONER

(Additional *Amici Curiae* on Inside Cover)

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INTEREST OF *AMICI CURIAE*

The *amici curiae* filing this brief are the National Council of Higher Education Loan Programs, Inc. ("NCHELP"); Great Lakes Higher Education Corporation and its affiliates, Great Lakes Higher Education Guaranty Corporation, Great Lakes Educational Loan Services, Inc., Northstar Guarantee Inc. and Education Assistance Corporation ("Great Lakes"); the New Mexico Educational Assistance Foundation and the New Mexico Student Loan Guarantee Corporation ("New Mexico Student Loans"); the Pennsylvania Higher Education Assistance Agency ("PHEAA"); the Rhode Island Higher Education Assistance Authority ("RIHEAA"); the Texas Guaranteed Student Loan Corporation ("TGSLC"); and the Utah Higher Education Assistance Authority ("UHEAA") (collectively, the "*amici*").[1]

NCHELP is the largest national trade association representing student loan organizations. It represents a nationwide network of guaranty agencies, secondary markets, lenders, loan servicers,

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. The parties have consented to the filing of this brief. Consent letters from the attorneys for Petitioner and Respondent are being filed concurrently with this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

collectors, schools and other organizations that provide financial assistance to millions of American students and their families each year through the Federal Family Education Loan ("FFEL") Program. The FFEL Program is a guaranteed loan program that, since its establishment by Congress as part of the Higher Education Act of 1965, which is now codified at 20 U.S.C. § 1071 *et seq.*, has helped over 60 million students obtain a postsecondary education.

Great Lakes, New Mexico Student Loans, PHEAA, RIHEAA, TGSLC and UHEAA are representative of both large and small guarantors. Most also service loans for lenders. Together, they serve millions of students and thousands of postsecondary schools across the country and manage billions of dollars in FFEL Program loans.

As loan guarantors, these *amici* are integral to the administration of the FFEL Program. Loan guaranty agencies are state or private nonprofit organizations that have an agreement with the Secretary of the United States Department of Education (the "Department") under which they administer a loan guarantee program under the Higher Education Act pursuant to 20 U.S.C. §§ 1078(b) and (c).

These guaranty agencies play a lead role in administering many aspects of the FFEL Program. Under the FFEL Program, they offer counseling to borrowers, and assist borrowers in obtaining deferments, forbearances and income-based

repayment arrangements. Of particular importance, they expend significant effort and cost helping borrowers avoid default and bankruptcy and rehabilitating defaulted loans. When a FFEL Program loan goes into default or a borrower files for bankruptcy, the guaranty agencies purchase the loan from the lender. They then manage the loan account for the benefit of the United States taxpayers.

SUMMARY OF ARGUMENT

The *amici* submit this brief as *amici curiae* in support of a petition for a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit, to review its decision in *Espinosa v. United Student Aid Funds, Inc.*, 553 F.3d 1193 (9th Cir. 2008) ("Espinosa").

The Ninth Circuit's decision in *Espinosa* upsets well-settled procedural safeguards in bankruptcy designed to protect the integrity of the FFEL Program. Those safeguards are clearly expressed by Congress in the Bankruptcy Code, which makes federal student loan obligations presumptively non-dischargeable. These safeguards were recognized in this Court's decision in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 449-452 (2004), stating that a debtor in bankruptcy is required to file an adversary proceeding in order to discharge his student loan debt as an "undue hardship" pursuant to 11 U.S.C. § 523(a)(8).

In *Espinosa*, the Ninth Circuit has decided an important question of federal bankruptcy law in a way that conflicts with this Court's ruling in *Hood* and with decisions of the Second, Fourth, Sixth, Seventh and Tenth Circuits.

This Court should resolve now the upheaval created by the *Espinosa* decision, because it has a tremendous, fundamental impact on (1) the operations of the FFEL Program lenders and their servicers, and of guaranty agencies, across the United States; and (2) the federal fiscal interest in federal student loans.

ARGUMENT

The Ninth Circuit's decision in *Espinosa* greatly impacts the fundamental scope of procedural safeguards afforded to lenders and guarantors in a bankruptcy action brought by a borrower of a FFEL Program loan. The Ninth Circuit adopted a rule allowing discharge-by-declaration, *i.e.*, discharge of student loan debt in bankruptcy through a declaration of discharge in a Chapter 13 plan, if the creditor does not object to the plan, without requiring service of a summons and complaint and without proof of an "undue hardship" on the debtor and the debtor's dependents in an adversary proceeding, all as required by 11 U.S.C. § 523(a)(8) and Federal Rule of Bankruptcy Procedure 7001(6).

Because the Ninth Circuit's decision conflicts with this Court's ruling in *Hood* and with the decisions of five other Courts of Appeals, there are

now differing interpretations of the Bankruptcy Code in different parts of the country, which causes great confusion for FFEL Program lenders and guarantors participating in this national student loan program.

Also, there is further uncertainty even in the Ninth Circuit. Since *Espinosa* conflicts with *Hood*, there is at least a substantial probability that the *Espinosa* decision will be overturned. This confusion and uncertainty will not quickly abate unless and until this Court considers the issues raised in *Espinosa*.

The uncertainty has and will have an enormous practical impact on the business of FFEL Program participants. Lenders and guaranty agencies must take certain actions when the borrower of a FFEL Program loan files a Chapter 7 or Chapter 13 bankruptcy. Until now, they have been able to take comfort that the ultimate obligation of the borrower would not be discharged unless the borrower commenced an adversary proceeding for discharge based on undue hardship. For this reason, they have different—and more rigorous—procedures for evaluating and responding to discharge petitions versus normal proposed Chapter 13 plans.

Guaranty agencies cannot now confidently rely on the scope of protection to be afforded to them in bankruptcy. Thus, the *Espinosa* decision will adversely affect the agencies' bankruptcy servicing

operations unless and until this Court resolves the uncertainty.

The *Espinosa* decision will require the agencies to drastically restructure their bankruptcy litigation procedures. They will be forced now to hire local counsel, enter an appearance and file an objection to each and every proposed Chapter 13 plan that seeks to discharge federal student loan obligations. The agencies will have to hire additional staff to carefully review and respond to each proposed Chapter 13 plan, at substantial cost to the agencies.

The implications of *Espinosa* are particularly problematic given the nature of the borrower population. Student loan borrowers are highly mobile; they commonly move into the states comprising the Ninth Circuit. Thus, *Espinosa* will affect lenders and their servicers, and guaranty agencies, across the country, regardless of whether they guaranty FFEL Program loans nationally or only for students going to schools in a particular state, or for that state's residents going to schools throughout the country.

A loan guaranteed by RIHEAA, for instance, to a student who attended a school in Rhode Island but who has since moved to California, may be subject to discharge-by-declaration in a personal bankruptcy case in California. RIHEAA's geographic location outside of the Ninth Circuit will not insulate it from the impact of the *Espinosa*

decision. The negative repercussions of *Espinosa* will be felt by all guaranty agencies nationwide.

Espinosa also will harm the federal fiscal interest in FFEL Program loans. The uncertainty created by the *Espinosa* decision undoubtedly will result in a large and sudden increase in the amount of non-dischargeable student loan debt that is improperly discharged. Due to the lack of an adversary proceeding and individual notice to the agencies by service of a summons and complaint, as required by the Federal Rules of Bankruptcy Procedure, the issue of discharge will not be brought to an appropriate level within the agencies for evaluation. The increased amount of improperly discharged FFEL Program loan obligations will be an expensive cost to the Department, which reinsures discharged FFEL Program loans. Ultimately, these costs will be borne by the United States taxpayers.

CONCLUSION

The Ninth Circuit's decision in *Espinosa* creates uncertainty throughout the FFEL Program, because it conflicts with this Court's established precedent and creates differing standards between the Ninth Circuit and other Circuits. This uncertainty undermines the important public interests balanced by a reliable, affordable and predictable federal educational loan system. For these reasons, *amici curiae* NCHELP, Great Lakes, New Mexico Student Loans, PHEAA, RIHEAA, TGSLC and UHEAA respectfully request that the

Court issue a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit in this case, and clarify this very important area of federal bankruptcy law.

Respectfully submitted,

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